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CASE NO. 82-1294

in the

Supreme Court

of the

United States

AZTEC STEEL COMPANY, A.F.S.C.O., INC.,
ATLANTIC STEEL FABRICATORS, INC.,
and FAIRMONT STEEL CORPORATION,
Petitioners,

vs.

FLORIDA STEEL CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

JURISDICTION

Respondent respectfully disagrees with the Petitioners' Question Presented, and any basis for Jurisdiction, in that the record reflects sufficient facts to show willfulness on the part of Petitioners in Petitioners' noncompliance with court orders.

The Question Presented is simply whether the District Court abused its discretion on August 25, 1981, by dismissing this action when, *after four hearings,* the Petitioners willfully refused to comply with explicit and unequivocal Court orders to fully and completely answer interrogatories served in May, 1977.

Note:
Petitioners were plaintiffs in trial court and appellants (sometimes called Aztec) on appeal. One plaintiff, Bay Steel Company, did not appeal.

Respondent, Florida Steel Corporation, together with Bethlehem Steel Corporation (Bethlehem), LaClede Steel Company (LaClede) were defendants in trial court and appellees on appeal. Bethlehem and LaClede amicably settled and were dismissed pending the appeal.

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STATEMENT

The omissions from Petitioners' statement are glaring.

The dismissal herein took place after extensive hearings, explicit directions of the Court with purported agreement by counsel for Petitioners, and a willful and intentional disregard by Petitioners of the explicit Court orders. The dismissal was for "willfully" disobeying Court orders.

As stated, suit was initially filed in December, 1975, and an amended Complaint was filed January 12, 1976. (I-19)

Even before the Amended Complaint, Petitioners filed interrogatories and requests for production to all Defendants. In April, 1976, Petitioners noticed depositions of personnel of Florida Steel as well as representatives of three of the four other Defendants. (I-43, 54, 64, 74-153, 175, 185; II-563, 566-9, 572, 576)

On May 18, 1976, in Petitioners' reply to Defendant Bethlehem's motion for a protective order as to the taking of the depositions of its personnel, the Petitioners advised the Court below that *"this truculent and unilateral action of BETHLEHEM is in direct contrast with that of the other Defendants who are proceeding on an amicable basis....* The other Defendants have agreed and are (1) answering interrogatories; (2) producing documents; (3) providing the requested deponents for depositions; (4) agreed to schedule depositions of nonparty or third party witnesses. Florida, for example, gave Notice of Withdrawal of Motion for Protective Order served April 30, 1976." (III-755)

On June 14, 1976, Petitioners deposed Mr. Gres, the Con-

References herein are to volumes of Record on Appeal before circuit court of appeals for the eleventh circuit.

troller of Florida Steel Corporation and began the deposition of Mr. Lewis, a Vice President of Florida Steel Corporation. (I-deposition transcripts)

Respondent Florida Steel was an active participant in all discovery.

On January 6, 1977, District Judge John A. Reed, Jr. wrote all counsel of record and requested that Petitioners' attorneys submit a proposed schedule for the completion of discovery. (IV-1085)

In February and March of 1977, the Petitioners served on Florida Steel and on the other Defendants, second, third and fourth interrogatories and second and third requests for production. (IV-1161-1232, 1293-1316)

In April, 1977, Defendant Bethlehem served extensive interrogatories and requests for production of documents upon all Petitioners. (VI-1749-1977)

In May, 1977, Defendant LaClede served extensive interrogatories and requests for production of documents upon all Petitioners. (VII-2286, 2319; VIII-2352-2479)

In June and July, 1977, Petitioners served fifth, sixth, seventh and eighth interrogatories on Defendants Florida Steel, LaClede, Owens Steel and Bethlehem. (X-3050-3394; XI-3397-3403)

During November of 1977, Petitioners filed answers and objections to the interrogatories submitted by Defendants Bethlehem and LaClede. Most of the responses by the Petitioners were objections to the effect that the Petitioner "should not be required to permanently fix its contentions concerning the activities of the Defendants in this case until it has had an

opportunity to do merit discovery. Most of the factual information sought in this Interrogatory is in the possession of the Defendants. Some of the factual information must be sifted from the Defendants' documents. Atlantic has not received production of most of the documentation requested in its Rule 34 requests and merit discovery is in its incipient stages. Therefore, Atlantic is without adequate information to answer this Interrogatory and objects, under Rule 33(b) of the Federal Rules of Civil Procedure, to responding at this stage of the litigation." (XII-3853-4068; XIII-4148-4202)

On January 31, 1978, District Judge Reed ordered all discovery completed by April 1, 1979. (XIII-4386)

On April 25, 1978, Defendant LaClede filed a motion to compel answers to its first interrogatories. (XIV-4597)

In their May 8, 1978 response to that motion, Petitioners admitted they had agreed to provide supplemental answers but requested from the Court additional time in which to do so. (XV-4710)

On June 16, 1978, the Honorable Paul Game, Jr., United States Magistrate, entered an order granting Defendant LaClede's motion to compel the Petitioners to provide more complete responses to LaClede's first set of interrogatories. That order reflects that counsel for Petitioners advised the Court that "the Plaintiff Atlantic Steel Fabricators, Inc. (hereinafter 'Atlantic') has established a computer program for compiling the information necessary to fully answer the interrogatories. An average of one to five people worked continuously from the fall, 1977, until approximately February, 1978, gathering the necessary information for use in the computer program. Since approximately February, 1978, until the present, five individuals have worked continuously and exclusively on this project. To date approximately two-thirds (2/3) of the pertinent informa-

tion has been compiled. Atlantic anticipates having all such information compiled and complete answers to LaClede's interrogatories prepared no later than October 15, 1978. Atlantic asserts that earlier completion is physically impossible due to the sheer volume of materials which must be assimilated before intelligent and complete answers to interrogatories can be furnished..... *All parties* have postponed taking oral depositions, pending final compilation of the data required for Atlantic to respond to interrogatories in question." (Emphasis added) (XV-4749-50)

On July 11, 1978 Defendant Bethlehem served a motion to compel answers to its first interrogatories. (XV-4751)

On September 18, 1978, a hearing on Bethlehem's motion was held before Magistrate Game. *At that hearing, after Petitioners' counsel advised the Court that the Petitioners would be able to provide answers by November 1, 1978, the following dialogue occurred:*

> The Court: "We will grant your request that you be given until November 1st to answer those; and make that a part of the same order.
>
> What about your computer business? Is that working out?"
>
> Mr. Arnold: "Yes, Your Honor, it has. We have got the data working and are starting to get the information back. It seems actually to be working." (Tr. 22).
>
> The Court: "Is there anything else we need to attend to now? You anticipate meeting these dates?"
>
> Mr. Arnold: "Yes, Your Honor, we do." (Tr. 23-24)

By order dated September 19, 1978, the Court granted Bethlehem's motion to compel and directed Petitioners to respond by November 1, 1978. (XV-4881)

In October and November, 1978, Petitioners filed supplemental answers in response to the two Court orders compelling responses. The various Petitioners' answers were predicated with the qualification that "in the course of future discovery, the Plaintiff expects to receive the additional documentation and pre-trial testimony which will complete the gaps in these answers." (Vol 2, Separate Folder)

On February 15, 1979, Judge Reed entered an order requiring all discovery to be completed by December 31, 1979. (XVI-4965)

In March, 1979, LaClede moved again to compel answers to its first interrogatories. (XVI-4966, 5012; XVII-5072-5193)

On April 3, 1979, the Petitioners filed memoranda in opposition to LaClede's motions to compel. The substance of these memoranda was that, contrary to their earlier promises to the Court, the Petitioners had provided all of the information they intended to provide. (XVII-5261, 5304, 5347; XVIII-5378)

Because of the new position taken by Petitioners, on June 6, 1979, Defendants Florida Steel, Bethlehem and LaClede filed a motion for an order requiring each Petitioner to file a detailed statement of its theory of impact, damages, and means of calculating damages. The memorandum in support of that motion recited that the order was "patently necessary because of Plaintiffs' egregious failures and refusals to respond to Defendants' numerous attempts to discover their theory of impact, theory of damage and a means of calculating their putative damages." (XVIII-5724)

Also in June, 1979, Bethlehem again moved for an order compelling answers to its first interrogatories. (XVIII-5524; XIX-5740, 5940, 6127; XX-6335)

The hearing on the LaClede and Bethlehem motions to compel *and* the motion of Florida Steel, LaClede and Bethlehem for an impact and damage summary was held on June 20, 1979. Counsel for the Petitioners and Magistrate Game had the following discussions:

> Mr. Womack: "We are now in the process of putting onto a computer program all of the files, which we call the contract files in the depositions and the testimony that we have in our possession for all four Plaintiffs."
>
> Mr. Womack: "Well, the truth of the matter is, Your Honor, *we were litigated out of money*. The economist stopped work on it, and the computer program stopped dead in the water. For months no work was done.
>
> We have now paid the economist up to date. He is back on the job, and the computer program is going forward."
>
> The Court: "Well, what's the bottom line?"
>
> Mr. Womack: "6/29/79 is the date that the ladies who are entering the data tell me that all the contracts will be on. The next estimate is two - correction, three to four weeks.
>
> • • • •
>
> It then goes to the economist, obviously. The minute it is available it will also go to the Defendants for review by their experts and their economists."
>
> The Court: "What you're saying is, you don't know what your proof in the case is yet. Is that what you are telling the Court?"
>
> Mr. Womack: "Essentially, Your Honor, I do not know." (Tr. 26-27)
>
> • • • •

The Court: "I don't think that parties to litigation should sit around waiting for money problems unless it's called to the Court's attention and you ask for some sort of extension in discovery and everything else and the Court is given an opportunity to consider that.

* * * *

You were just under an order to do certain things *based upon a representation that you made to the Court - your client was.*

* * * *

Well, what's the bottom line? When are they going to be able to discover your case?"

Mr. Womack: "October, which is - what? Six months. (Tr. 30).

* * * *

My information, the best information I have, if Your Honor please, is that this computer data will be ready and checked for trustworthiness and delivered to the economist in late August or early September.

Now, if he will work on it and if he can form his conclusions, we will submit them the minute he does." (Tr. 32).

* * * *

The Court: "Do you have the money to complete this case and go forward with it?"

Mr. Womack: "We have received some funds from a recent settlement with one of the Defendants, and those monies are being used exclusively for this purpose."

The Court: "Do you have sufficient - are you going to come back later and say you have run out of money again, or are you prepared to go forward with it?"

Mr. Womack: "Your Honor, if you will give us a day in court, we're going to try the case on what

dollars we have now. It may be less well prepared than we would like, but we're going with what we've got." (Tr. 34-35). (Emphasis added)

During the summer of 1979, numerous depositions were held. (Depositions, Vol. 2).

In October, 1979, the Petitioners deposed Mr. Flom, then President of Florida Steel, Mr. Haney, Vice President of Florida Steel, Mr. Hunsberger, Mr. Lewis, Mr. Flores and Mr. Wolf, all officers or former officers or managers of Florida Steel. (Depositions Vol. 2 and 3)

On November 26, 1979, Magistrate Game entered an order granting both LaClede's and Bethlehem's motions to compel answers for their first interrogatories. The court stated "that in light of the disposition of Defendants' motions to compel, Defendants' Motion for Order Requiring Each Plaintiff to File a Detailed Statement of Its Theory of Impact, Damages and Means of Calculating Damages is DENIED."

The Court further ordered all Petitioners to proceed expeditiously with discovery *or "the Court will consider the imposition of sanctions* provided for in Rule 37(b)(2)(C)." (emphasis added) (XXI-6584)

On January 10, 1980, the Court continued the pre-trial and trial until further order. (XXI-6597)

Thus, Respondent Florida Steel's Motion for Statement of Impact and Damages was *denied* because the Petitioners were ordered to answer the interrogatories and warned that sanctions would be forthcoming if they did not. (XXI-6584)

On January 15, 1980, the Petitioners filed second supplemental answers to LaClede's and Bethlehem's first interrogatories. (XXI-6598; XXII-7000; XXIII-7441)

In March, 1980, Bethlehem and LaClede filed motions to dismiss the Amended Complaint in accordance with Fed.R.Civ.P. 37(b)(2)(C). (XXIII-7588, 7730)

On March 27, 1980, Florida Steel filed a joinder in the motions to dismiss filed by Bethlehem and LaClede. (XXIII-7751) On April 7, 1980, Petitioners filed a memorandum in response to Florida Steel's joinder in which it asserted that Florida Steel had made no allegation that the Petitioners had failed to comply with "any discovery propounded by Florida Steel." (XXIV-7832)

On April 29, 1980, a hearing on the motions to dismiss was held before Magistrate Game.

On August 14, 1980, Magistrate Game issued a Report and Recommendation in which was specifically recited that before the Court were the motions to dismiss of Bethlehem and LaClede and the joinder of Florida Steel Corporation in those motions. Magistrate Game recited that after consideration of all of the matters that he found "that Plaintiffs' repeated failures *to comply with this Court's orders* compelling Plaintiffs to provide full and complete answers to Defendants' interrogatories are knowing and willful and represent intentional disregard to *Plaintiffs' obligations to this Court* and to the Defendants." (Emphasis added) (XXIV-7860, 7861)

In addition, Magistrate Game recommended that the Defendants be awarded their expenses including reasonable attorneys' fees. (XXIV-7861)

Thereafter, after extensive briefs, the Honorable George C. Carr, the Judge to whom the case had been assigned from Judge Reed, entered Memorandum Opinion and Order on August 25, 1981 dismissing the case with prejudice but refusing to award Defendants' reasonable attorneys' fees and costs because the

Court believed that the sanction of dismissal was the ultimate sanction. Judge Carr determined that the Plaintiffs had "willfully" disobeyed court orders.

Judge Carr noted that Petitioners' "facile protestations of good faith are simply not borne out of the total record. To the contrary, [their] history of broken promises to Magistrate Game and [their] failure to provide the Defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties." (XXIV-8137-8139)

On appeal, the United States Court of Appeals, Eleventh Circuit, Affirmed, stating in part (referring to Petitioners as AZTEC, one of Petitioners):

> "[1-4] The standard review for a Rule 37(b) dismissal is not whether the reviewing court would, as an original matter, have dismissed the action; it is whether the district court abused its discretion in dismissing the action.
>
> * * * *
>
> In the instant case the court found that Aztec knowingly and willfully failed to comply with court ordered discovery and that sanctions less severe than dismissal would be ineffective. We are unwilling to conclude that the district court abused its discretion.
>
> * * * *
>
> Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process. Aztec's contumacious conduct justified the district court's dismissal of the entire action. If we were to hold otherwise, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." *National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781." (Petitioners' Appendix A)

THE REASONS FOR GRANTING THE WRIT asserted:

A. CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT
B. CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS
C. IMPORTANT FEDERAL QUESTION

completely fail.

SUMMARY OF ARGUMENT

The actions of the Magistrate (Petitioners' Appendix B) and of the District Judge (Petitioners' Appendix C) were taken only after four hearings and several years and upon Petitioners' willful refusal to comply with explicit and unequivocal Court orders, in conformity with this Court's decision in *National Hockey League v. Metropolitan Hockey Club, supra,* as well as in conformity with decisions of other Circuit Courts of Appeal including decisions of the *Fifth Circuit,* of which the Eleventh Circuit was formerly a part. As the District Judge stated: "On the facts of this case, it is difficult to see how a less severe sanction than dismissal would be effective."

There is no abuse of discretion.

ARGUMENT

Petitioners assert that the record below does not demonstrate willful defiance of court orders. Respondent respectfully submits that the Magistrate's Report and Recommendation and Judge Carr's Memorandum Opinion and Order and the Opinion of the Eleventh Circuit more than adequately demonstrate the willful defiance present in this case.

The record reveals a series of inconsistent and contradictory

positions and representations to the Court on the part of the Petitioners which support a finding of willfulness.

All parties were involved in extensive discovery during the pendency of the action beginning in 1976.

The specific interrogatories at issue were propounded in April and May, 1977.

Petitioners in May, 1977, advised they were engaged in a "cooperative project (with other Plaintiffs) through which voluminous transactional information would be computerized and used in this case."

In response to LaClede's April 25, 1978, Motion to Compel and at a time when the court-ordered discovery cut-off date was then April 1, 1979, the Petitioners represented to the Court on May 8, 1978, that they "agreed to provide the supplemental responses."

When Magistrate Game entered the June 16, 1978, Order compelling answers to LaClede's first Interrogatories, he specifically recited the unequivocal representations by Petitioners' counsel *to the court* that "a computer program for compiling the information necessary to fully answer the interrogatories" had been set up and that Petitioners expected to be in a position to provide those answers by October 15, 1978.

Importantly, Magistrate Game noted that "all parties" have postponed depositions pending receipt of those answers.

On July 11, 1978, Bethlehem filed its motion to compel.

On September 18, 1978, Magistrate Game inquired of Petitioners' counsel about "your computer business? Is that working out?"

Petitioners' counsel replied: "Yes, Your Honor, it has. We have got the data working and are starting to get the information back. It seems actually to be working."

Based on those representations *to the Court,* the Court entered the September 19, 1978, order compelling answers to Bethlehem's first set of interrogatories by November 1, 1978.

In October and November, 1978, *purporting* to comply with the two orders, Petitioners filed supplemental answers which were nonresponsive and essentially reflected the same position previously taken: answers will be given when discovery is completed.

On February 15, 1979, Judge Reed ordered all discovery completed by December 31, 1979.

On March 3, 1979, LaClede *again* moved to compel answers to its first set of interrogatories.

In Petitioners' memoranda of April 3, 1979, in response to LaClede's motion, the Petitioners changed their position. No more was theirs a plea for more time. No reference is made to the then legendary computer program but, instead, the thrust of the response was that Petitioners had provided the best answers they could. For example, with regard to LaClede Interrogatory 45, a critical one asking for basic damage information, the Appellants said:

> "The economists who had been hired by the Plaintiff to formulate the damage study are not in a position to answer this Interrogatory at this time. As with the rest of LACLEDE's Motion to Compel, it continues to insist that the Plaintiff provide it with information which it does not possess." (XVII-5351)

The response by Petitioners to the effect that no other

answers would be provided, prompted Florida Steel, Bethlehem and LaClede to file the June 6, 1979, motion for an impact and damage study - that is, to require Petitioners to, *at a minimum,* provide definitive information on how they were allegedly affected by actions of Defendants and to what monetary extent.

Also in June, 1979, Bethlehem *again* moved to compel answers to its first interrogatories.

The inference that the dismissal should be reversed because the remaining Respondent Florida Steel never served interrogatories is a "red herring" at best. The Amended Complaint was dismissed because Petitioners refused to abide by *Court Orders,* but contrary to Petitioners' less than candid assertion that Florida Steel did not participate in discovery, Florida Steel fully participated. It also was fully entitled to use the Petitioners' answers to the sets of interrogatories in question. *Fidelity & Deposit Company of Maryland v. Hudson United Bank,* 653 F.2d 766,777 (3rd Cir. 1981); *Giaraffa v. Moore-McCormack Lines, Inc.,* 270 F.Supp. 342, 348-49 (S.D.N.Y. 1967); *Ohio Valley Electric Corp. v. General Electric Co.,* 244 F.Supp. 914, 954 (S.D.N.Y. 1965).

It was because of Florida Steel's involvement and direct interest in the answers for which it had been long waiting that it joined in the motion for an impact and damage study in June, 1979.

At the hearing on the motions to compel and for an impact and damage study, the Petitioners *once again resurrected the computer program.* Incredibly, they admitted it had been voluntarily discontinued because the Petitioners ran out of money. Yet never did the Petitioner seek relief from the orders.

> The Court: "What's the status of that? It seems to me you told me that was going to be completed sometime in the—"

Mr. Womack: "Well, the truth of the matter is, Your Honor, we were litigated out of money. The economist stopped work on it, and the computer program stopped dead in the water. For months no work was done.

We have now paid the economist up to date. He is back on the job, and the computer program is going forward."

The Court: "Well, what's the bottom line?"

Mr. Womack: "6/29/79 is the date that the ladies who are entering the data tell me that all the contracts will be on. The next estimate is two - correction, three to four weeks.

* * * *

The Court: "What you're saying is, you don't know what your proof in the case is yet. Is that what you are telling the Court?"

Mr. Womack: "Essentially, Your Honor, I do not know." (Tr. 26-27).

* * * *

The Court: "I don't think that parties to litigation should sit around waiting for money problems *unless it's called to the Court's attention and you ask for some sort of extension in discovery and everything else and the Court is given an opportunity to consider that.* (emphasis added)

You were just under an order to do certain things based upon a representation that you made to the Court - your client was.

* * * *

Well, what's the bottom line? When are they going to be able to discover your case?"

Mr. Womack: "October, which is - what? Six months. (Tr. 30).

* * * *

The Court: "Do you have the money to complete this case and go forward with it?"

Mr. Womack: "We have received some funds from a recent settlement with one of the Defendants, and those monies are being used exclusively for this purpose."

The Court: "Do you have sufficient - are you going to come back later and say you have run out of money again, or are you prepared to go forward with it?"

Mr. Womack: "Your Honor, if you will give us a day in court, we're going to try the case on what dollars we have now. It may be less well prepared than we would like, but we're going with what we've got." (Tr. 34-35).

By its November 26, 1979, Order, the Court once again granted the motions to compel answer to the *first* interrogatories, now over two years having elapsed since being filed, the Court specifically found "that the answers are evasive, incomplete and non-responsive." A review of the same certainly bears that out. (XXI-6582)

The Court ordered Petitioners to "fully, completely and with specificity" answer the same two first sets of interrogatories. (XXI-6583)

The Court denied the motion for an impact and damage study "in light of its ordering the answers to interrogatories." (XXI-6584) (The information would come to the Defendants, including Florida Steel, through the answers to the interrogatories.)

The Court specifically cautioned the Petitioners to "proceed expeditiously with the discovery, or the Court will

consider the imposition of sanctions provided for in Rule 37(b)(2)(C)." (emphasis added) (XXI-6584)

On January 15, 1980, the Petitioners filed Second Supplemental Answers in response to the Court Orders and warnings as to sanctions. (XXII-7130)

The answers were unresponsive, evasive and no more adequate than the previous answers.

In March, 1980, Florida Steel, Bethlehem and LaClede moved the Court to dismiss the Petitioners' Amended Complaint in accordance with Fed.R.Civ.P. 37(b)(2)(C).

On April 29, 1980, a hearing on the Motions to Dismiss was held before Magistrate Game.

On August 14, 1980, Magistrate Game issued his Report and Recommendation to the effect that the Amended Complaint be dismissed with prejudice and that attorneys' fees be taxed against Petitioners.

Magistrate Game found "that Plaintiffs' repeated failures to comply with this Court's orders compelling Plaintiffs to provide full and complete answers to Defendants' interrogatories *are knowing and willful and represent intentional disregard* to Plaintiffs' obligations *to this Court* and to the Defendants." (Emphasis added.)

Extensive responses to the Report and Recommendation were filed by Petitioners and Defendants. Yet *at no time* between August 14, 1980, and August 25, 1981, the date of Judge Carr's dismissal order, *did Petitioners make any attempt to comply with, or seek relief from, the Court's orders.*

Judge Carr *found that willfulness was established* by the record:

> "This finding is amply supported by the record. Despite considerable out-of-court negotiation and numerous court orders, the plaintiffs have yet to file adequate answers to the defendants' first set of interrogatories. Instead, notwithstanding Magistrate Game's specific warnings, the plaintiffs have chosen to file stock answers to the interrogatories which, in large part, merely rehash answers that the magistrate found inadequate *three* years ago. Moreover, the plaintiffs have not shown why they cannot produce the basic information that has been requested. Significantly, until they were faced with motions to dismiss, the plaintiffs had repeatedly promised Magistrate Game that they were able to, and would, answer the interrogatories in full and requested only that they be given more time to computerize the information. Consequently, the plaintiffs' recent assertion of an inability to comply is not persuasive.
>
> In sum, the plaintiffs' facile protestations of good faith are simply not borne out by the total record. To the contrary, their history of broken promises to Magistrate Game and their failure to provide to defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties.
>
> * * * *
>
> On the facts of this case, it is difficult to see how a less severe sanction than dismissal would be effective. The discovery requested is basic to the plaintiffs' case as well as the defendants' defense thereby making it impossible to isolate and strike out a portion of the pleadings to which the discovery is directed. In addition, the plaintiffs has been given ample opportunity to produce the information so that staying further proceedings would not be appropriate. Furthermore, as noted above, the plaintiffs have made no showing

to substantiate their allegations of an inability to comply. Consequently, although dismissal is "the ultimate sanction," *Griffin v. Aluminum Co. of America*, 564 F.2d 1171, 1173 n. 3 (5th Cir. 1977), it is appropriate in this case to insure the integrity of the discovery process and to deter others from disregarding discovery orders issued by the magistrates and this Court.

For the same reasons, dismissal is appropriate as to all defendants and not just those who filed the interrogatories. Rule 37(b) sanctions are imposed for failures to comply with court orders. Accordingly, it is not fatal to the defendants' motions to dismiss that the plaintiffs are not technically in default with regard to Florida Steel. They are in default with regard to Magistrate Game's orders. *See generally Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236 (8th Cir. 1977)." Petitioners' Appendix C (emphasis added)

The Magistrate, the District Judge and the Circuit Court of Appeals found this case precisely in conformity with this Court's decision in *National Hockey League v. Metro Hockey Club, supra,* in which crucial interrogatories remained unanswered after *17 months* despite extensions, admonitions of the court and promises of the plaintiffs. The court, *upon* consideration of the full record, found that the plaintiffs "willfully disobeyed court orders," ... "have been given ample opportunity to produce information" and "have made no showing to substantiate their allegations of inability to comply." "Consequently, ... the ultimate sanction ... is appropriate to insure the integrity of the discovery process and to deter others from disregarding discovery orders issued by magistrates of this Court."

As the United States Supreme Court observed in *National Hockey League v. Metro Hockey Club, supra:*

"The question, of course, is not whether this

Court, or whether the Court of Appeals, would as an original matter have dismissed the action, it is whether the District Court abused its discretion in so doing. E.g., C. Wright & A. Miller, Federal Practice and Procedure: Civil §2284 p 765 (1970); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F2d 1204, 1211 (CA8, 1973); *Baker v. F & F Investment*, 470 F2d 778, 781 (CA2, 1972).

* * * *

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." 427 U.S. at 642.

Petitioners urge conflict with the decisions of *Jones v. Louisiana Bar Ass'n*, 602 F.2d 94 (5th Cir. 1979), in which there was a refusal to obey a court order deemed by the trial court to be "deliberately obstructive" and the sanction of dismissal was imposed. The Circuit Court of Appeals in the instant case noted

the *Jones* decision and that "dismissal will not be upheld if a party's failure to comply is due to inability rather than wilfullness, bad faith or disregard."

The Circuit Court of Appeals found in this case as in *Jones*, that "when a party demonstrates a flagrant disregard for the Court and the discovery process, however, dismissal is not an abuse of discretion.

The case of *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976), cited as conflicting with the instant decision, involved a far shorter time period: there was a failure to comply with interrogatories filed in January and February, 1975; order to compel on June 5, 1975; order on July 15, 1975, to comply in five (5) days; partial compliance; an order on October 17, 1975, to comply; and dismissal on November 24, 1975. The contention again was inability to comply, but the District Court found the disregard of the orders "unbelievably flagrant." There the Appellate Court stated at 1381:

> "... It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction. It is our responsibility solely to decide whether the district court could, in its discretion, have determined the appellant's conduct to be so flagrant as to justify striking its pleadings. In the case at bar, the district court's findings that the appellant was in 'flagrant disregard' of the court's orders finds support in the record. We cannot say the district court abused its discretion."

Finally, Petitioners urge conflict with *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980) as presenting a fact pattern of the envisioned in this case. There is no similarity whatever. There was:

> "four day noncompliance ... caused by the good faith, sincere, but mistaken interpretation of the correct deadline of the District Court's order" (p. 768)

and the Court further noted that no discovery cut-off was even scheduled until a much later date.

In the instant case, there was a history of broken promises over several years, an utter disregard for court orders and a finding of "knowing and willful ... intentional disregard of Plaintiffs' obligations to the Court and to the Defendants." Petitioners' Appendix C.

The Circuit Court of Appeals, Eleventh Circuit, therefore, found Petitioners' "contumacious conduct" justified the district court's dismissal of the entire action.

CONCLUSION

The lower court did not abuse its discretion and the affirmance of the dismissal by the Circuit Court of Appeals for the Eleventh Circuit, does not conflict with decisions of this Court or of the other Circuit Courts of Appeals.

The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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and

By: _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI has been furnished by U.S. Mail this 1st day of March, 1983, to R. BENJAMINE REID, ESQUIRE, Kimbrell, Hamann, Jennings, Womack, Carlson & Kniskern, P.A., Suite 900, Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131, Attorneys for Petitioners.

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